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'Scotland in the United Kingdom: An enduring settlement'?

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Abstract

The Scotland Act 2016 makes extensive changes to the Scottish devolution settlement in implementation of the Vow made by the leaders the three main political parties at Westminster in the final days of the referendum campaign. This chapter outlines the principal changes made to the settlement by the new Scotland Act and asks whether it provides the basis for an enduring settlement between Scotland and the rest of the United Kingdom. The Scottish constitutional debate has been largely about 'self-rule' rather than 'shared rule': the acquisition by Scotland of control over its 'own affairs' rather than Scotland's 'voice' in relation to 'reserved matters', i.e. those matters which continue to be dealt with at the UK level of government. The model on which the original devolution settlement was based was one of dual rather than cooperative federalism in which decisions in relation to reserved matters would continue to be taken in much the same way as before. Intergovernmental relations provide one means by which the devolved administrations may seek to influence reserved matters, but 'intergovernmental relations in the UK remain weakly institutionalized and more ad hoc than is the case in more established federal political systems, and provide only limited opportunities to participate in UK decision-making'. The revised settlement will put a premium on cooperation between the two levels of government, particularly in the field of welfare. Whether that will materialise, and with it, a different - more cooperative, less centre-dominated - mind set at the heart of government remains to be seen. On that, however, the success of the revised settlement may well depend.

Keywords

Devolution, federalism, self-rule, shared rule, intergovernmental relations

Introduction

The second ways of federalism conference invites reflections on the success of federal systems in addressing and re-directing secessionist claims, especially in plurinational societies in which political forces with significant support seek to establish an independent state. Leaving aside the question of whether the United Kingdom qualifies as a 'federal system', as we are instructed to do, such an exercise is of obvious relevance to the United Kingdom where the prospect of Scottish secession has not disappeared following the 2014 independence referendum, despite a seemingly clear majority for Scotland remaining part of the United Kingdom, and may well come to the fore again following this summer's EU referendum. In the meantime, the Scottish Parliament is set to become 'one of the most powerful devolved parliaments in the world' (HM Government 2015) as a result of the Scotland Act 2016, which was enacted in implementation of the Vow made by the leaders of the three main political parties at Westminster in the final days of the referendum campaign. In this chapter we examine the changes made to the Scottish devolution settlement by the new Scotland Act and ask whether it provides the basis for an 'enduring settlement' between Scotland and the rest of the United Kingdom.

Devolution not federalism

The roots of the UK's 'federal system' are traceable to the report of the Royal Commission on the Constitution (the Kilbrandon Commission), which was set up in 1969 in response to the growth in electoral support for nationalist parties in Scotland and Wales to 'investigate the case for transferring or devolving responsibility for the exercise of government functions from Parliament and the central government to new institution of government in the various countries and regions of the United Kingdom' (Kilbrandon Commission: para 13).

Having identified 'centralisation' as a major but not the only cause of dissatisfaction with government, the Royal Commission identified three means by which powers could be transferred to a country or region: 'separatism', which would involve the transfer of sovereignty in all matters, in effect creating an independent state; federalism, which would see sovereignty divided with sovereignty in certain matters (e.g. education, health) being transferred and sovereignty in other matters (e.g. defence, foreign affairs) retained; and devolution in which sovereignty would be retained in all matters with the exercise of selected powers being 'delegated' to the regions (Kilbrandon Commission: para 423).

The Royal Commission had little hesitation in rejecting independence: 'For separation to succeed it must command the general support of the people concerned. … In our judgment the necessary political will for separation does not exist. The vast majority of people simply do not want it to happen' (Kilbrandon Commission: para 497).

As between federalism and devolution, the Royal Commission thought were particular reasons for not introducing federalism into the United Kingdom. It saw federalism as a 'legalistic system intended for a much earlier stage of constitutional development', which would require 'a written constitution, a special procedure for changing it and a constitutional court to interpret it. None of these features has been present in our constitutional arrangements before, and we doubt very much whether they would now find general acceptance' (Kilbrandon Commission: para 527). A federation consisting of four units – England, Scotland, Wales and Northern Ireland – would be so unbalanced to be unworkable. It would be dominated by the overwhelming political importance and wealth of England (which accounts for 84 per cent of the UK's population). There was no satisfactory way of fitting England into a fully federal system (Kilbrandon Commission: para 531), an argument which for some commentators continues to be decisive.

But the most fundamental objection, in the Royal Commission's estimation, was that federalism would tend to undermine political and economic unity and make the objectives of the United Kingdom more difficult to attain. If government in the United Kingdom was to meet the present-day needs of the people, the Commission concluded, it was necessary for 'the undivided sovereignty of Parliament to be maintained. We believe that only within the general ambit of one supreme elected authority is it likely that there will emerge the degree of unity, cooperation and flexibility which common sense suggests is desirable. Even if a federal system could be designed to avoid domination by England (and we do not think it could) it would endanger the essential unity which now exists and make some important tasks of government more difficult to perform. It would probably be regarded by the British people as a strange and artificial system not suited to their present stage of constitutional development, and in the end would bring the provinces very little more independence than might be achieved within a unitary system. In short, the United Kingdom is not an appropriate place for federalism and now is not an appropriate time' (Kilbrandon Commission: para 539).

The devolution settlement

It was to take another 25 years before devolution was introduced in Scotland and Wales, and, after a long period in which it had been suspended, re-introduced in Northern Ireland. The Scotland Act 1978 made provision for a Scottish Assembly with limited law making powers but the scheme was never implemented after it failed to secure the necessary measure of popular support in a referendum. The main features of the Scottish devolution settlement introduced 25 years later are as follows:

Parliamentary sovereignty

As the Kilbrandon Commission regarded as essential, the United Kingdom Parliament remains sovereign, in theory at least. 'To sum up', Lord Sewel, one of the Government spokesmen, said in the parliamentary debates on the Scotland Bill, 'we are setting about a devolved settlement - nothing more, nothing less. It is not the first step on the road to some other settlement, whether that be independence or federalism. It is a self-contained settlement, based on the principles of devolution. Essential to that is the recognition that sovereignty remains with the UK Parliament. The UK Parliament retains the ability to legislate on all matters, but it devolves the power to legislate, other than on reserved matters, to the Scottish parliament' (HL Debs 21 July 1998, vol 592, col 799 (Lord Sewel)).

This has a number of consequences, the most important of which is that the UK Parliament retains the power to legislate in the devolved areas (Scotland Act 1998, s 28(7); the UK Government also retains veto powers, which, like the Westminster Parliament's paramount legislative power, were regarded as an essential feature of a non-federal constitution (Kilbrandon Commission: para 765)). By convention, however, the UK Parliament does not normally legislate in the devolved areas without the Scottish Parliament's consent. Westminster legislation in the devolved areas has proved more common than anticipated at the time of devolution, with more than 150 'Sewel' or 'legislative consent' motions signifying the Scottish Parliament's consent to Westminster legislation in the devolved areas (or altering its legislative competence or the executive competence of the Scottish Ministers). The UK Parliament, however, has never legislated in the devolved areas without the Scottish Parliament's consent.

It also means that the institutions of Scottish self-government could in theory be abolished at any time, a wholly unlikely possibility but a recurrent source of criticism nonetheless (see e.g. Scottish Government 2013: 336).

The division of competences

Rather than listing the matters devolved to the Scottish Parliament at Holyrood, with all other matters being reserved to the UK Parliament at Westminster, which was the approach adopted by its failed 1978 predecessor, the Scotland Act listed the matters reserved to Westminster with all other matters being devolved to Holyrood. Defence and national security, macro-economic policy, foreign affairs, immigration, broadcasting, energy, social security and pensions, and the constitution were reserved, leaving the 'majority of domestic policy' devolved, including health, education, justice, local government, housing, planning, economic development,, transport, the environment, agriculture and fisheries, sport and the arts. The devolution of power, in one observer's view, was on 'a prodigious scale. There has

probably never in any country been a greater voluntary handover of power by any national government to a subnational body within its own borders' (King 2007: 193).

Financial arrangements

Under the devolution settlement the Scottish Parliament was to be funded mainly by UK Treasury block grant. The choice of Treasury block grant rather than taxes as the principal means of financing the Parliament's budget reflected a number of considerations: the availability of an already existing mechanism for determining Scotland's share of UK public expenditure in the shape of the population based 'Barnett formula'; UK Treasury opposition to the devolution of tax raising powers; and a concern on the part of Scotland's political representatives to ensure that Scotland continued to receive its 'fair share' of UK public expenditure. For the Scottish Constitutional Convention, it was essential that Scotland continue to be 'guaranteed her fair share of UK resources, as of right.' (Scottish Constitutional Convention 1995: 27), a concern acknowledged in the devolution White Paper, which said that the arrangements for financing the Scottish Parliament would, among other things, ensure that Scotland continued to benefit from its 'appropriate share of UK public expenditure' (Scottish Office 1997: para 7.2).

That concern with 'fairness' - with ensuring that Scotland 'continued to benefit from its appropriate share of UK public expenditure' (Scottish Office 1997: para 7.2) – is as apparent today as it was in the beginning. But it has been supplemented by a much greater emphasis on the Scottish Parliament's financial accountability. In a much quoted lecture in 2003, the Parliament's first Presiding Officer argued that 'no self-respecting parliament should expect to exist permanently on 100% handouts demined by another parliament, nor should it be responsible for massive public expenditure without any responsibility for raising revenue in a manner accountable to its electorate' (Lord Steel of Aikwood 2003).

The Commission on Scottish Devolution (the Calman Commission), which was set up by the opposition parties in the Scottish Parliament, with the support of the UK Government, in response to the 2007 minority SNP government's 'National Conversation' on Scotland's constitutional future (Scottish Government 2007), was accordingly asked 'to review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.' In order to increase the Scottish Parliament's financial accountability, the Commission recommended the introduction of a Scottish rate of income tax, in partial replacement of UK income tax, and the devolution of a number of minor taxes; the Parliament should also be empowered to introduce new devolved taxes with the agreement of the UK Parliament (Commission on Scottish Devolution 2009). The Commission was confident that its recommendations, once implemented, would make clear that the Scottish Parliament was not 'wholly dependent in grant from another Parliament', and was now responsible for raising 'a significant proportion of its revenue', estimated a 35 per cent, 'in a manner accountable to the electorate' (Commission on Scottish Devolution 2009: para 3.208). Its recommendations were given effect (with some modifications) by the Scotland Act 2012 in what the accompanying White Paper described as 'the largest transfer of fiscal power from London since the creation of the United Kingdom' (HM Government 2010: 11).

Scotland's 'voice at the centre'

The Scottish constitutional debate has been largely about 'self-rule' rather than 'shared rule': the acquisition by Scotland of control over its 'own affairs' rather than Scotland's 'voice' in relation to 'reserved matters', i.e. those matters which continue to be dealt with at the UK level of government. The model on which the devolution settlement was based was one of dual rather than cooperative federalism in which decisions in relation to reserved matters would continue to be taken in much the same way as before. Intergovernmental relations provide one means by which the devolved administrations may seek to influence reserved matters - territorial representation in the national parliament another - but 'intergovernmental relations in the UK remain weakly institutionalized and more ad hoc than is the case in more established federal political systems, and provide only limited opportunities to participate in UK decision-making' (McEwen 2016: 232). The Calman Commission sought a 'much better developed and more robust framework between parliaments and governments … to ensure that, where developed and reserved responsibilities overlap or impinge on one another, proper coordination and joint working are more fully encouraged and supported, with appropriate scrutiny by the parliaments to which the governments are accountable' (Commission on Scottish Devolution 2009: para 4.128), but implementation of its recommendations was overtaken by the independence referendum.

The role of the courts

Finally, the courts have a role in the devolution settlement but it is about ensuring that the Scottish Parliament remains within the bounds of its competence rather than guaranteeing a division of powers on the federal model. A decision that the Scottish Parliament was acting within its legislative competence, however, would make it difficult, in practice, for the Westminster Parliament to override it either by legislating for Scotland or by altering the distribution of powers (Bogdanor 2009: 115).

The Scotland Act changes

There was only one question on the ballot paper for the independence referendum on 18 September 2014: 'Should Scotland be an independent country?' As part of the negotiations between the United Kingdom and Scottish Governments over a referendum that was 'legal, fair and decisive', the Scottish Government had sought a second question on further powers for the Scottish Parliament, but the UK Government was adamant that only once the question of Scotland's future within the United Kingdom had been settled could there be any consideration of further devolution. With a UK general election set to take place in May 2015, the assumption was that work on further powers in the event of a No vote would only begin after the UK general election, by which time the countdown to the Scottish Parliament elections in May 2016 would already have begun. In the final days of the referendum campaign, however, with the polls suddenly narrowing, the leaders of the three main political parties at Westminster 'vowed' to deliver 'extensive new powers' for the Parliament 'by the process and according to the timetable announced by our three parties, starting on 19 September' (*Daily Record*, 16 September 2014), a vow widely regarded, rightly or wrongly, as having sealed victory for the No campaign.

The Smith Commission, a cross-party commission, overseen by Lord Smith of Kelvin, was convened immediately after the referendum, with the task of reaching agreement on the devolution of further powers to the Scottish Parliament by 30 November 2014. The Commission, in which all five political parties in the Scottish Parliament including the SNP took part, reached agreement on a package of new powers to be devolved to the Parliament (Smith Commission 2014), which was published on 27 November 2014, ten weeks after the referendum, confounding the expectations of those who doubted whether any form of agreement could be reached in such a short space of time. The UK Government undertook to prepare draft legislative proposals to implement the agreement by 25 January 2015, which would form the basis of a Scotland Bill to be brought forward by the next UK Government following the general election in May 2015. Draft clauses were published on 22 January 2015 (HM Government 2015), and the Scotland Bill was introduced in the House of Commons on 28 May 2015, following the Conservative Party's victory at the UK general election. After protracted negotiations over the accompanying 'fiscal framework', the Scottish Parliament agreed to the Bill's consideration by Westminster on 16 March 2016, clearing the way for the Bill to complete its parliamentary stages and become law on 23 March 2016, less than a year after its introduction, and less than two years after the referendum.

The Act makes the following changes to the devolution settlement in implementation of the Smith Commission agreement:

The Scottish Parliament and the Scottish Government

The Scottish Parliament and Scottish Government are both declared to be 'a permanent part of the United Kingdom's constitutional arrangements', to which end they 'are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum' (Scotland Act 2016 s 1, inserting new s 63A(1) in Scotland Act 1998). There will no doubt be those who argue that Westminster retains the power to abolish the Scottish Parliament and the Scottish Government without a referendum, but the political reality, which the Act reflects, is that the Scottish Parliament and Scottish Government are part of the United Kingdom's constitutional arrangements, and will continue to be so for so long as Scotland remains part of the United Kingdom.

In the parliamentary proceedings on the Bill, the UK Government insisted that the declaration of permanence had no bearing on the doctrine of parliamentary sovereignty, which remained unchanged: 'It appears to us that, in light of the Smith commission agreement, the Government should be prepared to make that political declaration of permanence. It does not take away from the supremacy or sovereignty of this United Kingdom Parliament. That remains' (HL Debs 8 December 2015, vol 767, col 1465 (Lord Keen)).

The Sewel convention

The Act also recognizes that the Parliament of the United Kingdom 'will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament' (Scotland Act 2016, s 2, inserting new s 28(8) in Scotland Act 1998). As applied in practice, the 'Sewel convention' extends to Westminster legislation altering the Scottish Parliament's legislative competence and the executive competence of the Scottish Ministers, as well as with regard to devolved matters. Such changes may be made by executive order under the Scotland Act (Scotland Act 1998, s 30(2)), in which case the consent of the Scottish Parliament is required. Their inclusion within the scope of the convention thus ensures the

need for the Parliament's consent regardless of whether they are made by primary or secondary legislation. The United Kingdom Government, however, resisted amendments to the Scotland Bill which would have reflected the convention's application in practice, possibly with a view to leaving it free to argue that replacement of the Human Rights Act by a British Bill of Rights in implementation if its election manifesto commitment would not require the Scottish Parliament's consent under the convention.

The repeal of section 28(7) of the Scotland Act, which affirms the continuing powers of the United Kingdom Parliament to make laws for Scotland, was not canvassed during the Smith Commission process, but the combined effect of these two provisions is to set the seal on a federal or near federal relationship between Scotland and the rest of the United Kingdom, in which the devolution settlement cannot be amended or legislation enacted with regard to devolved matters without the Scottish Parliament's consent.

Elections, composition and functioning

In a further recognition of its 'coming of age', the Scottish Parliament will also assume 'all powers' in relation to elections to the Scottish Parliament and local government elections in Scotland (but not in relation to Westminster or European elections), together with control over its composition and functioning. Rather than being amendable by ordinary process of legislation, however, Scottish Parliament legislation amending the franchise, the electoral system or the number of constituency and regional members for the Scottish Parliament will require to be passed by a two-thirds majority of the Scottish Parliament (Scotland Act 2016, s 11).

Welfare and taxation

The Scottish Parliament's powers are also increased in the fields of welfare and taxation. As regards the former, the state pension remains reserved, as does universal credit, which will replace the existing working age benefits when it is fully implemented, but the Scottish Ministers will have the power to alter the frequency of universal credit payments, and the Scottish Parliament the power to vary the housing cost elements. Outside universal credit, a number of individual benefits are devolved, including attendance allowance, carer's allowance, disability living allowance and personal independence payments. The Scottish Parliament also acquires the power to create new benefits in areas of devolved responsibility. A feature of the Scottish devolution settlement hitherto has been that it has proceeded on the basis of a clear distinction between reserved and devolved matters. The Act's welfare provisions, however, create what is effectively a partially shared competence – a 'shared legislative space' - which will require a much higher degree of cooperation between the two governments than has previously been the case (Gallagher 2015).

As regards taxation, the Scottish Parliament will gain the power to set the rates of UK income tax and the thresholds at which these are paid for the non-savings and non-dividend income of Scottish tax payers. Other taxes (air passenger duty and the aggregates levy) are also devolved, and the first ten percentage points of the standard rate of VAT raised in Scotland assigned to the Scottish Government's budget. Once the changes are brought into force, it is estimated that the Scottish Parliament will control around 60 per cent of spending in Scotland and retain around 40 per cent of Scottish tax receipts, with the difference between income and expenditure continuing to be met by UK Treasury block grant.

The fiscal framework

Under the accompanying fiscal framework agreed between the two governments (HM Government and the Scottish Government 2016), the block grant will be adjusted to reflect the introduction of devolved and assigned revenues and the transfer of responsibility for welfare. Crucially, Scotland will protected against the risk that its population and hence its revenues might grow more slowly than those of the rest of the United Kingdom. The agreement, however, is only for five years, after which it will be reviewed, with the review being informed by an independent report, and the method of adjusting the block grant thereafter agreed jointly by the two governments.

Intergovernmental relations

The Smith Commission saw increased powers for the Scottish Parliament as demanding strengthened collaboration between the Scottish and UK Governments: 'The parties believe that the current inter-governmental machinery between Scottish and UK Governments, including the Joint Ministerial Committee (JMC) structures, must be reformed as a matter of urgency and scaled up significantly to reflect the scope of the agreement arrived at by the parties' (Smith Commission 2014: para 28). In a personal recommendation added to the report, Lord Smith, the chair of the Commission, urged the two governments to tackle the issue of 'weak intergovernmental working'. The current situation 'coupled with what will be a stronger Scottish Parliament and a more complex devolution settlement means the problem needs to be fixed. Both Governments need to work together to create a more productive, robust, visible and transparent relationship. There also needs to be greater respect between them.' (Smith Commission 2014: Foreword). At the plenary meeting of the JMC on 15 December 2014, Ministers agreed to commission work on a revised version of the Memorandum of Understanding which governs relations between the UK Government and the devolved administrations. At the time of writing, discussions on a revised Memorandum of Understanding have still to be concluded. Commentators are in no doubt, however, as to the need for a marked strengthening of mechanisms that could facilitate shared rule as well as a willingness on the part of both governments to utilize them. What is required is 'a shift to more federal mind-set at the heart of central government, and a commitment to making such a system work from all governments concerned' (McEwen 2016: 240-241).

An enduring settlement?

The literature on federalism tells us that simply increasing self-rule without any attempt to generate at the same time a federal focus of loyalty is unlikely to prevent the disintegration of a federal system (Watts 2008:182-183). 'It is clear that more regional autonomy may contribute to the accommodation of diversity, but by itself it is unlikely to be sufficient. It needs to be accompanied by the institutional encouragement of common interests that provide the glue to hold the federation together. Thus *both* the elements of "self-rule" for constituent units and "shared rule" through common institutions, a combination that characterises federal political systems, are essential to their long-run effectiveness in combining unity and diversity' (Watts 2008: 23).

What 'building in' as well as 'building out' (Simeon 2009: 247-248) might involve in the United Kingdom case is a matter for debate. One approach that has attracted some attention involves the revision and codification of the UK's 'territorial constitution', understood as the distribution of powers and resources across the constituent nations of the United Kingdom.

‘It is no longer acceptable’, Gallagher argues, ‘for people in Scotland, and indeed Wales and Northern Ireland, to see the UK as a complex territorial state, but for many at the centre to behave as if it were a unitary state based on an outdated notion of parliamentary sovereignty.’ If Scotland is to remain in the UK, the UK has to ‘redefine its territorial nature, not just settling the details of the constitution for a devolved Scotland in the Scotland Bill, but setting out the territorial constitution of the UK as a whole, in a way which respects Scotland’s long held status as both separate and part of the UK at the same time’ (Gallagher 2015a; see also Bingham Centre for the Rule of Law 2015).

Recent years have seen no lack of proposals for a constitutional convention to settle some or all aspects of the UK’s unwritten constitution. The difficulty of reaching any form of agreement over the territorial constitution, however, should not be underestimated (Evans 2015). In particular, there is no obvious incentive for the SNP to subscribe to any agreement which might threaten the ultimate prize of independence. ‘To argue for a written constitution would seem, at least to the Scots, a barrier rather than an enable of further social and political change, something which would lock them into the Union should they decide to leave it’ (McCrone 2015). In the meantime, the increasingly complexity of the devolution settlement creates a need for enhanced cooperation between the two levels of government. Whether that will materialise, and with it a different - more cooperative, less centre-dominated - mind set at the heart of government remains to be seen. On that, however, the success of the revised settlement may well depend.

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